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A GROWING PROBLEM: WHY THE FEDERAL GOVERNMENT NEEDS TO SHOULDER THE BURDEN IN PROTECTING WORKERS FROM WEIGHT DISCRIMINATION

Kari Horner*

Jazzercise, Inc. denied certified applicant Jennifer Portnick an instructor position because at five feet eight inches and 240 pounds, she failed to satisfy the position’s “looking fit” requirement. After weeks of mediation, Jazzercise, Inc. dropped its appearance requirement for instructors and acknowledged that people of varying weights may be “fit.” Participants at a “street circus,” in honor of the tenth International No Diet Day, erupted in joy when they heard the settlement announcement.

Weight-based employment discrimination is a serious and widespread problem. Employers often deny well-qualified applicants employment simply because they are overweight. This unfair discrimination denies

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2. Id. The mediation was conducted with the San Francisco Human Rights Commission. Id. Ms. Portnick was indeed “fit,” as she was able to work out six days a week and teach back-to-back aerobics classes. Id. Instead of working for Jazzercise Inc., Ms. Portnick since has decided to run her own fitness program. Id.


5. Id. at 339-41. It is important to note the differences in medical terms referring to weight. “Overweight refers to an excess of body weight [that] may come from muscle, bone, fat, and/or body water.” NAT’L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, U.S. DEP’T OF HEALTH & HUMAN SERVS., STATISTICS RELATED TO OVERWEIGHT AND OBESITY, http://www.niddk.nih.gov/statistics/index.htm (last modified Oct. 6, 2004) [hereinafter NIDDK]. Obesity means that someone has an “abnormally high proportion of body fat.” Id. While someone may be overweight without being obese, many overweight people are also obese. Id. The most common way to determine if someone is overweight or obese is by calculating body mass index (BMI). Id. Overweight is defined “as a BMI of 25-29.9 kg/m²,” whereas obesity is “a BMI of 30 kg/m² or greater.” Id. A BMI calculator is available at NAT’L HEART, LUNG, & BLOOD INST., U.S. DEP’T OF HEALTH & HUMAN SERVS., CALCULATE YOUR BODY MASS INDEX, http://www.nhlbisupport.com/bmi/ (last visited Jan. 22, 2005).
workers the opportunity to use the knowledge or skills they possess. Because the workforce includes an increasing number of overweight workers, the loss of such human capital could prove economically damaging.

Few legal remedies exist for weight discrimination. Jennifer Portnick could have sued under federal or state employment laws which are based on a real disability or perceived impairment that causes the employer to regard the employee as disabled. Instead, she chose to sue under San Francisco's "short and fat law," one of four statutes in the country prohibiting employment discrimination on the basis of weight. Nationwide, disability laws are unpredictable, providing inconsistent and unreliable protection for overweight workers. To overcome this deficiency, the Federal Government must provide protection from

6. See Mason, supra note 4, at 346 (arguing that it is unfair that Joyce English, who is college-educated in social work and law enforcement, is relegated to odd jobs and manual labor because of her weight).

7. See id. at 343-44, 46. It is important to note the uses of the words overweight or obese in this Comment. The word "fat" is preferred by the fat liberation movement, activists who are dedicated to educating people about weight in an effort to eliminate negative stereotypes about overweight people. See, e.g., NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE, INC., NAAFA INFORMATION INDEX, http://www.naafa.org/documents/brochures/naafa-info.html (last visited Jan. 22, 2005). Because the "ideal weight" is generally measured using certain social groups (White, middle-class Americans), medical terms, such as obesity, may not accurately reflect all populations. Elizabeth Kristen, Addressing the Problem of Weight Discrimination in Employment, 90 CAL. L. REV. 57, 59 n.6, 60 (2002). In this Comment, the general term "overweight" is used because the difference between the terms "overweight" and "obesity" make a difference in the application of disability laws. See infra Parts III.C-IV.

8. Kristen, supra note 7, at 60.


weight discrimination to insure that overweight workers receive the protection they deserve.

This Comment examines the legal protection available to overweight people confronted with employment discrimination. This Comment first discusses how courts apply disability statutes such as the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and state disability laws to weight discrimination in the workplace. Next, this Comment explores how local antidiscrimination statutes remedy weight discrimination. This Comment then analyzes the results of litigation under such statutory schemes and explains the advantages provided by laws prohibiting discrimination specifically on the basis of weight. Finally, this Comment advocates expanding local anti-weight discrimination statutes into a federal law specifically protecting people on the basis of weight to effectively combat all aspects of weight discrimination.

I. THE PERVERSIVENESS AND EFFECTS OF DISCRIMINATION AGAINST OVERWEIGHT AND OBESE WORKERS

A. Weight-Based Employment Discrimination Is a Widespread Problem

Weight discrimination potentially affects a significant percent of the American workforce. One study reports that sixty percent of overweight women and forty percent of overweight men describe themselves as victims of employment discrimination. The number of obese and overweight people, rising steadily since 1960, has now increased to 54.9% of adults age twenty years or older. This trend of an

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16. NAT'L HEART, LUNG, & BLOOD INST., supra note 14, at 7-8.
increasingly overweight and obese population shows no signs of reversing.  

Additional studies illuminate the problem of weight discrimination in employment. One study reveals that forty-four percent of employers would reject female job candidates solely on the basis of obesity. In another study, overweight applicants received negative ratings on hiring potential, qualifications, and a variety of personal characteristics, regardless of their job qualifications. The presumption that overweight or obese people lack “energy, drive, self-discipline, and self-care” contributes to these statistics, even though a person’s weight does not produce these traits. Negative stereotypes of overweight people include a presumption of moral flaws, which leads to the inference that overweight people are responsible for the prevalent negative prejudice against them.

Overweight people also contend with wage discrimination. General benefits and health insurance may be offered to overweight workers on different terms than other workers. Overweight people receive promotions less often than their “average” weight coworkers and hold

17. See id. However, a recent study alleges that Americans have lost weight in the past year. Julie Deardorff, The Skinny on How Fat We Really Are, CHI. TRIB., Oct. 19, 2003, at Q1, LEXIS, News Library, Chtrib File. The results of the study stated that obesity and overweight rates were down from fifty-six percent to fifty-five percent. Id. However, the firm noted that this was the first drop in overweight rates in eighteen years. Id. The article notes that all other studies indicated that obesity rates are skyrocketing. Id. In fact, “[s]everal national obesity experts literally laughed at the results” of the study reported on in this article. Id.

18. Kristen, supra note 7, at 62-63. The same study shows that sixteen percent of employers would refuse to hire obese women. Id. at 62.


20. See SOLOVAY, supra note 11, at 102. In fact, the people in the best position to understand weight and its relation to character traits also hold an anti-obese bias. Sameh Fahmy, Doctors Hold Anti-obese Bias, Study Finds, TENNESSEAN, Oct. 27, 2003, at B1. Health professionals and researchers, participating in a survey given during the North American Association for the Study of Obesity’s annual meeting, were found to be quicker to pair words like “fat” with “lazy” and other negative stereotypes than they were to pair other words, including “thin” and “motivated.” Id. The result is a medical environment that makes many overweight patients feel uncomfortable. Id. Therefore, overweight patients may be less likely to seek out medical care and more likely to switch doctors. Id.

21. SOLOVAY, supra note 11, at 102.

22. Kristen, supra note 7, at 64.

23. SOLOVAY, supra note 11, at 106. This matter may soon be governed by legislation, as lawmakers are working on proposals “linking health insurance premiums to obesity.” Ceci Connolly, Public Policy Targeting Obesity, WASH. POST, Aug. 10, 2003, at A1.
jobs of "lower prestige" or "noncontact positions." Studies show that overweight women earn significantly less than thinner women.

B. Employment Discrimination Against the Overweight Deprives the Economy of Well-Qualified Workers

Increasing numbers of American workers face these prejudices. To be hired, overweight workers may need better qualifications than fellow job applicants. After graduating from a professional program, overweight people, especially women, may be unable to find jobs in their respective fields, unlike their thinner counterparts.

Weight-based employment discrimination may cause well-qualified workers to remove themselves from the job market. A majority of overweight and obese women report suffering from low self-confidence in the job search process. The unlikely possibility of being hired discourages overweight applicants from certain types of jobs, such as those involving interaction with the public.

C. Medical Information Concerning Overweight Conditions/Obesity

As Jazzercise acknowledged, people of differing sizes and weights may be considered "healthy" or "fit." Medical research shows that being overweight does not necessarily make someone unfit. Being overweight does, however, increase the probability of heart disease, hypertension, stroke, gallbladder disease, respiratory problems, and certain cancers. On the other hand, some studies maintain that this connection between health and weight is tenuous. Regardless, clear evidence shows that a

24. Kristen, supra note 7, at 64; see also SOLOVAY, supra note 11, at 106.
25. SOLOVAY, supra note 11, at 106; Kristen, supra note 7, at 64.
26. NAT'L HEART, LUNG, & BLOOD INST., supra note 14, at 7 (reporting that increasing numbers of Americans are obese).
27. SOLOVAY, supra note 11, at 101.
28. Cf. id. at 104, 106 (explaining that overweight people are less likely to get jobs for which they apply and overweight women with a masters of business administration rarely make it to top management positions). In fact, the percentage of overweight women finding work in top management may be so low as to be a statistically nominal group. Id. at 106.
29. See id. at 101, 104.
30. Id. at 104.
31. See id.
32. Fernandez, supra note 1.
34. NAT'L HEART, LUNG, & BLOOD INST., supra note 14, at xi.
"fit," overweight person enjoys considerably reduced health risks and should be considered "healthy." 36

Many employers push dieting or other weight-loss methods on overweight workers. 37 Americans of all sizes, including forty percent of adult women and twenty percent of adult men, report dieting. 38 Approximately thirty-seven billion dollars are spent annually on weight-loss techniques and products. 39 However, dieting has proven to be notoriously unsuccessful. 40 Contributing to this failure is the fact that "[o]besity is a complex multifactorial chronic disease that develops from an interaction of genotype and the environment" and "involves the integration of social, behavioral, cultural, physiological, metabolic and genetic factors," making it difficult to pinpoint the origin of the disease. 41

Many diets are also dangerous. 42 Dieters face an increased risk of developing an eating disorder. 43 Weight fluctuations of obese people who frequently diet and lose weight in the short-term have unhealthy repercussions. 44 Dieting also causes negative physiological and psychological effects. 45 Other weight loss methods for the overweight may result in serious consequences, most notably the heart problems associated with diet pills and dangerous complications of popular weight loss surgeries. 46

36. See Brody, supra note 33. This Comment does not advocate that overweight or obese people should not attempt to achieve a more active lifestyle or to lose weight if they wish to do so. It does advocate that society's negative images of weight are not reflective of an overweight person's actual level of fitness or ability to make a meaningful contribution to the workforce in accordance with his or her job skills.

37. SOLOVAY, supra note 11, at 105-06.

38. Kristen, supra note 7, at 69.


40. Kristen, supra note 7, at 69. Studies indicate that "fewer than one of every 20 dieters achieves lasting success." Peter Perl, The Incredible Shrinking Buyers, WASH. POST MAG., Mar. 30, 2003, at 6, 10.

41. NAT'L HEART, LUNG, & BLOOD INST., supra note 14, at xi; see also Kristen, supra note 7, at 69 (explaining that weight is based upon a variety of factors). Some scientists posit that a "fat virus" may even be partially to blame for the prevalence of obesity. Sally Squires, A Question from the Edge: Is Fat Contagious?, WASH. POST, Aug. 3, 2004, at F1.

42. Kristen, supra note 7, at 69-70.

43. Id. at 70.

44. See id.

45. See Perl, supra note 40, at 24. Perl's article describes the Duyer family's struggle with weight loss. Id. at 8. The article highlights many of the family's struggles with their weight, including the stress and frustration caused by weight cycling and several failed diets. Id. at 8, 17.

46. Kristen, supra note 7, at 70. About one in 200 patients undergoing gastric bypass surgery dies from the surgery. Perl, supra note 40, at 17. Infections and complications
II. DIFFERENT METHODS OF LEGAL PROTECTION FOR OVERWEIGHT WORKERS

Currently, the ADA and the Rehabilitation Act provide the most effective, and the only substantial federal, legal protection for overweight workers. However, courts have interpreted and applied these statutes to weight-based discrimination cases in a variety of ways. State disability laws are another source of protection for overweight workers. A few local jurisdictions, for example, have created laws prohibiting discrimination on the basis of weight.

occur at a rate of about fifteen percent. Id. Ms. Regina Viscik, a morbidly obese woman, underwent this surgery. Viscik v. Fowler Equip. Co., 800 A.2d 826, 828 (N.J. 2002). Although she lost 350 pounds within one year, the side effects, including liver damage, kidney stones, gastritis, and malnutrition, were so severe that Ms. Viscik had the procedure reversed. Id. at 828-29.

47. SOLOVAY, supra note 11, at 132. The ADA provides in relevant part: “The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12101(2) (2000). Regulations interpreting the Rehabilitation Act of 1973 (Rehabilitation Act) include the same definition:

(j) Handicapped person. . . .
(2) As used in paragraph (j)(1) of this section, the phrase:

(iv) Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. § 84.3(j)(2)(iv) (2003). The ADA and the Rehabilitation Act should be interpreted as consistent with one another. Bragdon v. Abbott, 524 U.S. 624, 638 (1998). To date, any claim of weight-based discrimination brought under an equal protection argument has failed. Elizabeth E. Theran, “Free To Be Arbitrary and . . . Capricious”: Weight-Based Discrimination and the Logic of American Antidiscrimination Law, 11 CORNELL J.L. & PUB. POL’Y 113, 173 (2001). A few claims brought under Title VII alleging “disparate treatment” have succeeded. Id. at 175. However, these claims may be tied to the person being a member of a protected class. See Roehling, supra note 15, at 990 (describing the case of a disparate impact discrimination claim where plaintiff argued that the employer’s requirement for a slimmer hip measurement had a disparate impact on African-American women); see also infra Part III.C (discussing the inadequacies of disability laws).

48. See infra Part III.A.


A. Protection Through Classifying Obesity as an Actual or “Regarded as” Disability

Some employees have prevailed in weight discrimination cases by convincing courts to include obesity in the definition of disability, either as an actual disability or as a perceived impairment that the employer regarded as a disability.51 These weight discrimination claims have been brought under the ADA, Rehabilitation Act, or state statutes prohibiting disability discrimination.52 Courts define “disability” and interpret the statutes differently.53

Under the ADA, an employee may allege that the employer’s discrimination was based on an actual disability or on a perceived impairment that caused the employer to regard the employee as disabled.54 In either case, the employee must prove that the employer considered the real or “regarded as” disability as substantially limiting one of the employee’s major life activities.55 Major life activities may include “caring for oneself, performing manual task, walking, seeing, hearing, speaking, breathing, learning, and working.”56


52. See, e.g., Cook, 10 F.3d at 21-22 (applying the Rehabilitation Act); Texas Bus Lines, 923 F. Supp. at 968 (applying the ADA); Gimello, 594 A.2d at 265 (applying New Jersey disability law). The Equal Employment Opportunity Commission (EEOC) publishes a manual on interpretation of the term “disability” under the ADA. See EQUAL EMPLOYMENT OPPORTUNITY COMM’N, 2 COMPLIANCE MANUAL (1995), available at http://www.eeoc.gov/policy/compliance.html. The EEOC Manual provides that “normal deviations in . . . weight . . . that are not the result of a physiological disorder are not impairments.” Id. § 902.2(c)(5). Furthermore, “[b]eing overweight, in and of itself, generally is not an impairment.” Id. However, “severe obesity, which has been defined as body weight more than 100% over the norm is clearly an impairment.” Id. (footnote and citation omitted). Additionally, a recognized impairment may cause obesity. Id.

53. SOLOVAY, supra note 11, at 162.
55. Id.
56. 29 C.F.R. § 1630.2(i) (2004).
This distinction between real and "regarded as" disabilities is important. If a plaintiff's weight is considered to be a physical impairment that substantially limits one of his major life activities, he is covered by the ADA, regardless of his employer's perception of his impairment.\textsuperscript{57} Alternatively, even if a plaintiff is not otherwise physically limited, he may show that he is "regarded as" having an impairment because the "attitudes of others toward [his] impairment substantially limit one of his major life activities."\textsuperscript{58} The "regarded as" claim provides a valuable legal option for overweight plaintiffs, who may prove that their employer regarded their weight as substantially limiting a major life activity, even when they cannot show that their weight constitutes an impairment that substantially affects a major life activity.\textsuperscript{59}

\textbf{1. Some Courts Have Interpreted Disability Laws as Providing Coverage for Weight Discrimination Complaints}

Issues of obesity, weight discrimination, and disability law were first significantly addressed at the appellate level in \textit{Cook v. Rhode Island Department of Mental Health, Retardation, & Hospitals.}\textsuperscript{60} After the Department refused to rehire well-qualified Bonnie Cook because of her morbid obesity, a jury awarded her job placement, retroactive seniority, and monetary damages.\textsuperscript{61} Ms. Cook based her claim on the Rehabilitation Act.\textsuperscript{62} On appeal, the First Circuit acknowledged that a jury could recognize a dysfunction causing morbid obesity as a physical

\textsuperscript{57} See 42 U.S.C. § 12,102(2); see also \textit{EQUAL EMPLOYMENT OPPORTUNITY COMM'N, supra} note 52, § 902.2(a)-(b).

\textsuperscript{58} See 29 C.F.R. § 1630.2(l) (2004). The rationale behind the "regarded as" disability definition is that even though an impairment does not actually limit a major life activity, the reactions of others to that impairment may prove just as disabling. \textit{See Theran, supra} note 47, at 181-82.

\textsuperscript{59} \textit{See Theran, supra} note 47, at 181.

\textsuperscript{60} \textit{See} 10 F.3d 17 (1st Cir. 1993); Steven M. Ziolkowski, \textit{Comment, The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals}, 74 B.U. L. REV. 667, 683-84 (1994).

\textsuperscript{61} Ziolkowski, \textit{supra} note 60, at 667, 681-82. Ms. Cook had previously worked for the Department of Mental Health, Retardation, and Hospitals from 1978 to 1980 and 1981 to 1986. \textit{Cook}, 10 F.3d at 20. During both periods of employment, "she departed voluntarily, leaving behind a spotless work record." \textit{Id.} Additionally, "[t]he defendant concede[d] that [Ms.] Cook's past [work] performance met its legitimate expectations." \textit{Id.} Also, at the time of her reapplication, although she was five feet two inches tall and weighed over 320 pounds, the nurse conducting the pre-hire physical "found no limitations that impinged upon [Ms. Cook's] ability to do the job." \textit{Id.} at 20-21. However, the employer argued "that [Ms.] Cook's morbid obesity compromised her ability to evacuate patients in case of an emergency." \textit{Id.} at 21; \textit{see also} \textit{EEOC v. Tex. Bus Lines}, 923 F. Supp. 965, 977-79 (S.D. Tex. 1996) (evaluating a similar employer claim).

\textsuperscript{62} \textit{Cook}, 10 F.3d at 20.
disability. The court did not distinguish Ms. Cook's claim as a real or "regarded as" disability; it held that the Rehabilitation Act protected Ms. Cook because the jury could have rationally concluded that her employer regarded her obesity as substantially limiting her major life activity of working.

The U.S. District Court for the Southern District of Texas, in EEOC v. Texas Bus Lines, protected an overweight worker through an interpretation of the ADA. The EEOC represented Arazella Manuel, a morbidly obese woman. Despite a successful interview, good references, and completion of the necessary road test, Texas Bus Lines refused to hire Ms. Manuel. The examining physician for the required physical observed that Ms. Manuel "waddled" while walking to the examining room and decided that she could not move quickly enough to assist passengers if there were an accident. He disqualified her for this reason, although Department of Transportation regulations did not disqualify drivers solely because they were morbidly obese.

The court examined Ms. Manuel's claim under the ADA, applying a four part test. Under this test, Ms. Manuel had to show that she was (1) disabled within the meaning of the ADA; (2) qualified to be a driver, with or without accommodation; (3) subjected to an adverse employment action; and (4) replaced by a non-disabled person or treated less favorably than non-disabled employees. The court found that Ms.

63. Id. at 23-24.
64. See id. at 23.
65. Id. at 25-26. The court noted that the defendant's evidence about Ms. Cook's capabilities was not based on individualized evidence of her personal abilities or qualifications. Id. at 27. In fact, the evidence presented was almost entirely based on stereotypes of obese people. Id. The Rehabilitation Act prohibits that type of evidence. See id. Also, concerns about increased costs or absenteeism due to Ms. Cook's weight were "a prohibited basis for denying employment." Id.; see also Viscik v. Fowler Equip. Co., 800 A.2d 826, 837-38 (N.J. 2002) (holding that a combination of an objective and a subjective standard will be used in evaluating employer's decisions); Parolisi v. Bd. of Exam'rs, 285 N.Y.S.2d 936, 938-40 (N.Y. Sup. Ct. 1967) (holding that a violation of employee's state constitutional rights had occurred when employer had not evaluated her ability to work subjectively).
67. Id. at 973-76, 979 (holding that Texas Bus Lines had discriminated on the basis of a "regarded as" disability).
68. Id. at 967.
69. Id. at 967-68.
70. Id.
71. Id.
72. Id. at 969. This is referred to as the McDonnell Douglas test, which is also used in other discrimination claims, including claims of weight discrimination under Michigan's Elliot-Larsen Act. Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 593 (Mich. Ct. App. 1998) (per curiam).
Manuel was a qualified driver due to her job experience, references, and clean driving record.\textsuperscript{73}

The court specifically held that obesity itself was \textit{not} an "actual" disability protected by the ADA.\textsuperscript{74} Therefore, to prevail on her disability claim, Ms. Manuel had to prove that her potential employer regarded her weight as an impairment (whether actual or perceived) that "substantially limited" a major life activity.\textsuperscript{75} The court did not explain which major life activity Texas Bus Lines regarded as substantially limited, but held that "[i]f [an] employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear or stereotype' can be drawn."\textsuperscript{76} Texas Bus Lines illegally had refused to hire Ms. Manuel because of an illogical assumption about her weight that had been fueled by a negative stereotype, not because they regarded her obesity as limiting a major life activity, such as working.\textsuperscript{77} The court then allowed Ms. Manuel ADA protection because Texas Bus Lines regarded Manuel's weight as a disability.\textsuperscript{78}

The Florida Court of Appeals, under a different interpretation of disability law, also afforded protection to an overweight worker. In \textit{Greene v. Seminole Electric Cooperative},\textsuperscript{79} the Florida Court of Appeals overturned a circuit court decision to dismiss Mr. Carl Greene's weight discrimination complaint.\textsuperscript{80} Although the plaintiff filed the claim under the Florida Civil Rights Act of 1992, the court construed the law in

\begin{itemize}
\item \textsuperscript{73} \textit{Tex. Bus Lines}, 923 F. Supp. at 971.
\item \textsuperscript{74} \textit{Id.} at 975-76 (basing its assertion on case law and regulations interpreting the ADA).
\item \textsuperscript{75} \textit{Id.} at 975; see also 29 C.F.R. § 1630.2 (2004) (describing a "regarded as" disability and defining "substantially limits" and "major life activity," two components necessary to any claim brought under the ADA).
\item \textsuperscript{76} \textit{Tex. Bus Lines}, 923 F. Supp. at 975.
\item \textsuperscript{77} \textit{Id.} at 979. Texas Bus Lines attempted to defend its adverse employment action against Ms. Manuel on several grounds. First, it maintained that its decision not to hire Ms. Manuel was based on her failed medical examination. \textit{Id.} at 978. The court rejected this contention, because the doctor's decision was merely a recommendation and was not based on a Department of Transportation (DOT) regulation. \textit{Id.} The DOT regulations did not have a weight restriction for bus drivers. \textit{Id.} The lack of weight requirements led the court to reject Texas Bus Lines's defense that the decision not to hire Ms. Manuel was based on a "job-related" or "business necessity" basis. \textit{Id.} at 979-80. Also, because the record was devoid of evidence showing that Ms. Manuel's obesity would jeopardize the health or safety of her passengers in an emergency situation, Texas Bus Lines could not base its adverse decision on health or safety concerns. \textit{Id.} at 980.
\item \textsuperscript{78} \textit{Id.} at 982.
\item \textsuperscript{79} 701 So. 2d 646 (Fla. Dist. Ct. App. 1997).
\item \textsuperscript{80} \textit{Id.} at 647-48. Mr. Greene specifically complained that he was denied promotions and harassed because of his obesity. \textit{Id.} at 647. For a further discussion of weight-based harassment, see \textit{infra} notes 217-20 and accompanying text.
\end{itemize}
conformity with the Rehabilitation Act and the ADA.\textsuperscript{81} The court further held that obesity could be a disability under the ADA.\textsuperscript{82} However, the court blurred the lines between an "actual" and a "regarded as" disability claim.\textsuperscript{83} Obesity could be a disability, but because Mr. Greene's complaint sufficiently alleged that his employer regarded him as substantially limited in the major life activity of working, he was allowed to proceed with his "regarded as" claim.\textsuperscript{84}

In some jurisdictions, local disability law may also protect overweight workers. In \textit{Gimello v. Agency Rent-A-Car Systems, Inc.},\textsuperscript{85} Joseph Gimello was fired because of his "actual or perceived obesity and not for any legitimate business reason."\textsuperscript{86} Mr. Gimello brought his claim under New Jersey's Law Against Discrimination (LAD).\textsuperscript{87} The court noted:

> We do not think it matters particularly whether his condition is dubbed an actual or perceived handicap. It was a recognized medical condition for which he sought legitimate treatment with but modest success. The record supports the conclusion that he was fired because of this physical condition which his supervisors perceived as a defect and which did not in fact disqualify him in any proven sense from his present job or his career path.\textsuperscript{88}

The New Jersey statute's definition of "handicapped" includes only actual physical disabilities, not "regarded as" disabilities.\textsuperscript{89} However, the court concluded that obesity, because it "exists physiologically and is

\begin{itemize}
\item \textsuperscript{81} Greene, 701 So. 2d at 647.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} See id. (stating first that obesity can be an "actual" disability and then stating that obesity may be viewed as a "regarded as" disability as well).
\item \textsuperscript{84} Id. If the Florida district court had not blurred these lines, it would be in direct contrast with the Southern District of Texas, which specifically held that obesity was not a disability under the ADA. See supra note 74 and accompanying text. Mr. Greene's claims that his employer conditioned the probationary period of his entry level position as grounds keeper on the basis of substantial weight loss, and that he was refused multiple mechanic's positions because of his weight, were sufficient to state a viable claim. Greene, 701 So. 2d at 647.
\item \textsuperscript{86} Id. at 265.
\item \textsuperscript{87} Id. The New Jersey Law Against Discrimination defines "handicapped" as suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness . . . or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. N.J. STAT. ANN. § 10:5-5q (West 2002).
\item \textsuperscript{88} Gimello, 594 A.2d at 273.
\item \textsuperscript{89} § 10:5-5q.
\end{itemize}
demonstrable by accepted diagnostic techniques,” is a disability protected by the statute.

2. Other Courts Have Interpreted Disability Law to Preclude Coverage for Weight Discrimination Complaints.

Overweight plaintiffs are not always able to establish a claim for weight discrimination under disability laws. For example, in Ridge v. Cape Elizabeth School Department, the District Court of Maine held that Ms. Ridge failed to establish that her obesity was protected by a “regarded as” disability claim under the ADA. To prevail on a “regarded as” disability claim, Ms. Ridge had to show that her employer perceived her to have an impairment that “substantially limited a major life activity.” Ms. Ridge would be substantially limited if she were unable to perform a “major life activity” that an average person could perform, or if she were “significantly restricted” in the manner in which she performed the activity. The court held that “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” Ms. Ridge’s employer did not regard her as unable to work in a wide range of jobs, precluding ADA coverage on her “regarded as” disability claim.

In Hazeldine v. Beverage Media Ltd., the Southern District of New York used a similar analysis as the Ridge court to evaluate “regarded as”

90. Gimello, 594 A.2d at 276. For another obesity case decided under this New Jersey law, see Viscik v. Fowler Equipment Co., 800 A.2d 826 (N.J. 2002). In that case, Ms. Viscik suffered from a metabolic disorder preventing her body from breaking down fats, resulting in severe obesity. Id. at 828. This disorder caused Ms. Viscik to suffer from a variety of medical problems, including degenerative arthritis, restricted lung capacity, depression, and bronchial asthma. Id. at 829. However, from the age of eighteen she had worked and supported several family members, including a sister-in-law, a twenty-year-old niece, and her niece’s children. Id. The court held specifically that Ms. Viscik was disabled under the New Jersey statute. Id. at 835. Her obesity qualified as a disability because it caused “physical infirmities” as a result of her metabolic disorder, a type of birth defect. See id. at 835-36.
91. 77 F. Supp. 2d 149 (D. Me. 1999).
92. See id. at 162, 164.
93. Id. at 162.
94. Id. at 162-63.
95. Id. at 164. The Supreme Court has resisted deciding whether working is a major life activity. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 200 (2002). The Court noted that even if working could be considered a major life activity, the “claimant would be required to show an inability” to perform “a broad range of jobs, rather than a specific job.” Id. When evaluating a claimant’s ability to perform manual tasks, the inquiry cannot be performed in the context of the plaintiff’s ability to perform a certain job. Id. at 200-01.
96. Ridge, 77 F. Supp. 2d at 149.
disability claims. Grace Hazeldine's "regarded as" disability claim failed because she could not show that her employer viewed her obesity as disabling or substantially limiting her ability to work. The court held that while obesity would be considered a physical impairment under the ADA, it only qualified as an actual disability if it substantially limited a major life activity. Under its interpretation of the ADA, the court found that Ms. Hazeldine was not disabled because her "ability to engage in physical activity was sufficient . . . to allow her to carry on her daily life." Ms. Hazeldine had also brought an action under the New York State Human Rights Law and the New York City Administrative Code. The court allowed these actions to continue because neither law required substantial limitation of a major life activity.

Another plaintiff, Toni Cassista, lost a weight discrimination case brought under a California disability law. The statute required that a plaintiff show a "physiological" impairment that "affect[ed] one or more of the basic bodily 'systems' and limit[ed] the claimant's ability 'to participate in major life activities.'" Despite evidence of weight

98. Id. at 705.
99. Id.
100. Id. at 703.
101. Id. at 704.
102. Id. at 706. The New York State law requires evidence of an impairment that "prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." (quoting N.Y. EXEC. LAW § 292(21)(McKinney Supp. 1997)). Therefore, if a plaintiff could prove an impairment through a medically accepted technique, it was unnecessary to prove a substantial limitation on a major life activity. Id. This is very similar to New Jersey's Law Against Discrimination. See supra notes 87-90 and accompanying text.

103. Hazeldine, 954 F. Supp at 706-07. While the New York State law required proof of an impairment through accepted medical techniques, the New York Administrative Code did not. Id.

104. Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1154 (Cal. 1993). At the trial level, the jury held unanimously for Community Foods. Id. at 1146. The court of appeal reversed because "the trial court erred in instructing the jury that plaintiff was required to prove that but for her weight, she would have been hired." Id. Instead, the court held that after the plaintiff produced evidence that her weight factored into her employer's decision, the burden shifted to her employer to show that it would have taken the same action regardless of the employee's weight. Id. The California Supreme Court granted review to determine whether Ms. Cook had established a prima facie case under California disability law. Id.

105. Id. at 1149. This seems to be a much harder definition to meet than the New York or New Jersey laws prohibiting discrimination. Those statutes allow a disability to be shown by any demonstrable medical technique. Hazeldine, 954 F. Supp at 706 (New York State law); N.J. STAT. ANN. § 10:5-5q (West 2002). Another state statute, the Arizona Civil Rights Act, requires a plaintiff to establish that his "handicap" is a physical impairment substantially restricting his general ability to succeed in the workplace. See Bogue v. Better-Bilt Aluminum Co., 875 P.2d 1327, 1330 (Ariz. Ct. App. 1994). However,
discrimination, Ms. Cassista's inability to establish that her weight affected one or more bodily systems ended her case. In some jurisdictions, an overweight worker may not be able to establish a claim under disability law for a "regarded as" disability. In Walton v. Mental Health Ass'n of Southeastern Pennsylvania, Ms. Sandra Walton brought suit under the ADA, alleging discrimination on the basis of obesity. The Third Circuit noted it had never recognized a cause of action based on obesity as a "regarded as" disability claim. Ms. Walton did not claim that her employer regarded her weight as substantially limiting to a major life activity, and therefore failed to state an adequate claim under the ADA.

B. Local Laws Extend Discrimination Protection on the Basis of "Weight"

The Michigan State Legislature passed the Elliott-Larsen Civil Rights Act in 1977, prohibiting employers from discriminating on the basis of weight. To establish a prima facie case of weight discrimination, the plaintiff can use circumstantial evidence to show that although she was well-qualified for the job, her employer treated her differently from

the impairment is not considered to be a handicap if it only interferes with his ability to perform a particular job for a particular employer, but does not affect the employee's ability to find work elsewhere. Id. A "perceived handicap" claim also is possible. Id.

106. Cassista, 856 P.2d at 1144-46, 1154. Ms. Cassista argued that her weight did not disable her in any way. SOLOVAY, supra note 11, at 153. Though correct, the assertion that her weight did not affect her ability to perform the job ultimately lost her the case. See id. at 153-54.

107. 168 F.3d 661 (3rd Cir. 1999).

108. Id. at 664.

109. Id. at 665. The Third Circuit therefore affirmed the decision of the district court, which denied Ms. Walton's petition to amend her complaint to add a claim of discrimination based on obesity as a "regarded as" disability. Id. at 665, 671.

110. Id. at 665-66. Ms. Walton asserted that her employer "did not release a promotional video in which she appeared because she was too obese." Id. at 665. She argued that because this refusal was based on her obesity, her employer viewed her as substantially limited in her ability to do her job, which included appearing in the video. Id. However, in order to claim successfully that an employer regards a plaintiff as substantially limited in the major life activity of working, an employer must consider the employee to be limited in a wide range of jobs, not just a single aspect of the job he or she currently holds. Id. at 665-66.

111. MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 2001). The Michigan statute states:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, nation origin, age, sex, height, weight, or marital status.

Id. (emphasis added).
someone outside of her protected class (weight). Once the plaintiff meets these requirements, thereby establishing a "prima facie" case, the burden shifts to the defendant to present a non-discriminatory reason for the employment action. By using this type of burden-shifting analysis, the Michigan courts closely track Title VII jurisprudence. Alternatively, plaintiffs may establish a "mixed motives" case by using direct evidence to establish the employer's weight-based animus. Overweight employees in Michigan have had some success in bringing claims under this statute.

The city of Santa Cruz, California, has also passed a law prohibiting weight discrimination. Like federal laws, such as the Age Discrimination in Employment Act (ADEA), the Santa Cruz Code permits an exception for "a bona fide occupational qualification." The

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114. Kristen, supra note 7, at 101, 104. ADA jurisprudence is similar in that once a disabled plaintiff establishes that he or she is "otherwise qualified" for the job at issue, the employer can then present evidence that the employment action is non-discriminatory. See Ridge v. Cape Elizabeth Sch. Dep't, 77 F. Supp. 2d 149, 157-58 (D. Me. 1999). A defendant can rebut the presumption of discrimination that had been created with the establishment of a prima facie case, if the defendant can satisfy the burden of showing a non-discriminatory motive. See id. at 158. The plaintiff in turn can present evidence that the non-discriminatory motive alleged by the employer is merely pretext. Id. This analysis follows the McDonnell Douglas method. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Supreme Court noted that because of the variation of facts in discrimination cases, the standard articulated was not inflexible. Id. n.13.


116. Kristen, supra note 7, at 105; see also Ross v. Beaumont Hosp., 687 F. Supp. 1115, 1124-25 (E.D. Mich. 1988) (denying defendant's request for a judgment notwithstanding the verdict on the issue of discrimination because a jury could presumably find that weight was a determining factor in her termination); Lamoria, 584 N.W.2d at 589 (reversing trial court's decision to grant summary judgment to defendant's weight discrimination claim).

117. SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (2004), http://www.ci.santacruz.ca.us/index.html. The statute provides in relevant part:

It is the intent of the city council, in enacting this chapter, to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or physical characteristic.

Id. (emphasis added).


119. SANTA CRUZ, CAL., MUN. CODE § 9.83.080(6) (2004), http://www.ci.santacruz.ca.us/index.html; see also 29 U.S.C. § 623(f)(1) (200) (allowing an employer facing an age discrimination claim the defense of a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"). The ADA does not allow
Santa Cruz law has not yet been tested in court. However, the local government in Santa Cruz believes that the law represents the general will of the Santa Cruz population.

After a popular movement in opposition to an offensive weight-loss advertising campaign, the city of San Francisco passed legislation in 2000 to prohibit discrimination on the basis of weight. Additional guidelines were passed in 2001 to aid enforcement and compliance. Jennifer Portnick’s Jazzercise case was the first settled under this law. Another case brought under this law entered mediation.

The District of Columbia provides indirect protection from weight discrimination on the basis of personal appearance. The definition of "personal appearance" includes "the outward appearance of any person... with regard to bodily condition or characteristics," presumably including weight. Weight discrimination claims under this law also appear to be unlitigated.

this defense. Instead, it allows an employer facing a disability discrimination charge to defend his action on a job-related and business necessity basis. Employers also may show that a qualification standard that may tend to "screen out" disabled employees includes a requirement that the employee not pose a threat to the health or safety of others in the workplace. See § 12113(a)-(b); see also EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 979-81 (S.D. Tex. 1996) (evaluating an employer’s job-related, business necessity, and health or safety defenses to a disability based on obesity discrimination suit).

120. See Kristen, supra note 7, at 105. No private enforcement actions have been taken, nor has the city of Santa Cruz pursued any actions under the ordinance. Id.
121. See id.
122. Id.; Fernandez, supra note 1. In a negative ad campaign, a fitness company ran ads that stated: "When the aliens come, they will eat the fat ones first." Kristen, supra note 7, at 105 (citing Evelyn Neives, New San Francisco Ordinance Decrees That All Sizes Fit, N.Y. TIMES, May 9, 2000, at A20).
123. HUMAN RIGHTS COMM’N, supra note 10.
125. HUMAN RIGHTS COMM’N, CITY AND COUNTY OF S.F., MINUTES, http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?id=16789 (Apr. 25, 2002). Cases with which the Human Rights Commission has dealt since the Jazzercise case included a case of an eight-year-old girl who was allegedly rejected from the San Francisco Ballet School on the basis of height and weight. Id. Another case involved an overweight woman “receiving derogatory messages via inter-office mail.” Id.
126. D.C. CODE ANN. § 2-1402.11 (2001). The statute provides in relevant part: “It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual. Id. (emphasis added).
127. Id. § 2-1401.02(22).
128. Id. § 2-1402.11. The statutory and legislative history of section 2-1402.11 of the District of Columbia Code is devoid of any appearance discrimination claims on the basis of weight, although cases have been brought on the basis of personal appearance bias.
III. ADVANTAGES AND DISADVANTAGES OF LAWS PROTECTING OVERWEIGHT WORKERS FROM DISCRIMINATION

A. Disability Law Provides Inconsistent Protection for Employees Bringing Weight-Based Employment Discrimination Claims

Laws protecting overweight people from discrimination under a general disability umbrella are ineffective. Courts have differed substantially in their determinations as to whether the ADA includes obesity. A plaintiff who cannot prevail because her jurisdiction does not consider weight to be an actual disability may still succeed if she can prove that her employer regarded her weight as a disability.

A survey of case law displays the differences in disability law interpretation. In Texas Bus Lines, the U.S. District Court for the Southern District of Texas held that obesity is not an actual disability. The Florida District Court of Appeals in Greene did not definitively rule if obesity could be a disability under the ADA. Other courts avoid the issue and generally appear more willing to proceed on a plaintiff's "regarded as" disability claim.

129. See SOLOVAY, supra note 11, at 162-26; Theran, supra note 47, at 173, 182-83.
130. See SOLOVAY, supra note 11, at 143, 162 ("[C]onfusion about the law, court hostility, and employer manipulation have resulted in unfair, muddled, and inconsistent decisions in other fat-as-disability cases."). Courts vary in deciding if weight can be considered a real disability under the ADA and to what degree it may substantially limit a person's major life activities. See infra Part III.A.

131. See 42 U.S.C. § 12102(2)(c) (2000); 45 C.F.R. § 84.3(j)(2)(iv) (2003); SOLOVAY, supra note 11, at 134-35. Part of this variation is due to the fact that a plaintiff who is morbidly obese, obese, or simply overweight may bring a claim under disability law. Id. The morbidly obese person is most likely to receive protection from the law, although all have been discriminated against on the basis of weight. Id.

132. EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 975-76 (S.D. Tex. 1996) ("Clearly, neither the case law nor the applicable regulations include morbid obesity as a disability under the ADA.").

133. Greene v. Seminole Elec. Coop., 701 So. 2d 646, 647 (Fla. Dist. Ct. App. 1997). The court construed a local statute "in conformity" with the ADA. Id. The court stated that "[o]besity can be a disability" and "morbid obesity can be an 'impairment'" falling under the ADA if the employer regards it as such. Id.

134. See, e.g., Cook v. R.I. Dep't of Mental Health, Retardation, & Hosp., 10 F.3d 17, 22-23 (1st Cir. 1993). The First Circuit noted that the jury did not decide if Ms. Cook actually suffered from a "cognizable impairment," or was merely regarded as disabled by her employer. Id. at 23. In fact, the court considered the record to support either type of claim, and that there was typically not a substantial difference in proving either kind of claim. Id. at 22-23 & n.5. The employer's defense focused on the perception that Ms. Cook's obesity affected her mobility and ability to do her job, which conclusively demonstrated to the court that the employer regarded Ms. Cook as disabled. Id. at 23.
The ADA regulations provide Interpretive Guidance on how to evaluate obesity as a disability.\textsuperscript{135} Obesity may be considered a physical impairment.\textsuperscript{136} However, the regulations specifically state that “except in rare circumstances, obesity is not considered a disabling impairment.”\textsuperscript{137} The regulations include obesity in a list of impairments, such as “broken limbs, sprained joints, concussions, appendicitis, and influenza,” which should not be considered as substantially limiting a major life activity.\textsuperscript{138}

While the medical basis for this analogy may be doubtful, courts frequently cite the ADA regulations when analyzing weight discrimination claims.\textsuperscript{139} In addition to the Interpretive Guidelines, courts use “the language of the ADA, ADA and disability interpretive guidelines, their own beliefs, popular culture, other court determinations, academic opinions, and medical views” in deciding if a person’s weight constitutes an impairment.\textsuperscript{140} While courts generally consider extreme obesity as an impairment, moderate obesity or the condition of being overweight is not considered an actual impairment under disability law.\textsuperscript{141}

Some state courts have not yet recognized a “regarded as” disability claim as another option for a plaintiff under the ADA.\textsuperscript{142} In courts recognizing a “regarded as” disability claim, the plaintiff may experience varying treatment, depending on the court’s particular approach.\textsuperscript{143} As

\textsuperscript{136} See id.
\textsuperscript{137} Id. This is echoed in the EEOC Compliance Manual. \textit{EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra note 52, \$ 902.2(c)(5)(ii).} The Second and Sixth Circuits have specifically held that obesity is not a disabling impairment, unless it is accompanied by an underlying physiological disorder. Theran, \textit{supra} note 47, at 184.
\textsuperscript{138} 29 C.F.R. pt. 1630 app. at 365. The analogy between the above impairments and obesity is a weak one; whereas a broken limb or sprained joint is a relatively temporary impairment, obesity is a more difficult condition to “cure.” \textit{See supra} Part I.C.
\textsuperscript{140} \textit{SOLOVAY, supra} note 11, at 135. The negative popular views about overweight people are well-documented. \textit{See supra} notes 20-21 and accompanying text.
\textsuperscript{141} See Roehling, \textit{supra} note 15, at 997 (stating that “Americans who are not morbidly obese would have to prove that their weight has a physiological cause in order to establish an \textit{actual} disability under the ADA”); \textit{see also} \textit{EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra} note 52, \$ 902.2(c)(5)(ii); \textit{SOLOVAY, supra} note 11, at 146. The ADA is best suited to protecting morbid obesity, as it is the most likely to affect a person’s “major life activity” as defined by the ADA. \textit{Id.} at 148-49.
\textsuperscript{142} \textit{E.g.,} Walton v. Mental Health Ass’n of Southeastern Pa., 168 F.3d 661, 665 (3d Cir. 1999). This is a very important option under the ADA because without the possibility of a “regarded as” disability claim, overweight plaintiffs who are not morbidly obese lack any legal alternatives. Theran, \textit{supra} note 47, at 181.
\textsuperscript{143} \textit{See generally SOLOVAY, supra} note 11, at 152-54 (discussing two California cases with different outcomes: one in which a plaintiff alleged that her employer perceived her as disabled because of her weight, even though she could do the work; the other in which
part of a "regarded as" disability claim, the plaintiff must prove that her employer considered her obesity as substantially limiting a major life activity. While some courts focus on the life activity of "working," others include the employer's consideration of the employee's daily activities. This approach creates a difficult choice for overweight employees, who may either assert that they are capable of working, which may defeat their claim, or that they are victims of a severe physiological disorder, though still functional.

The plaintiff conceded disability as a physiological disorder, stating a desire to lose the weight.

Compare Ridge v. Cape Elizabeth Sch. Dep't, 77 F. Supp. 2d 149, 164 (D. Me 1999) (holding that plaintiff lost "regarded as" claim because she could not show her employer regarded her as limited in the major life activity of working), with Greene v. Seminole Elec. Co., 701 So. 2d 646, 647 (Fla. Dist. Ct. App. 1997) (allowing the plaintiff to prevail on a "regarded as" disability claim because he proved the employer regarded him as substantially limited in the major life activity of working). There is also substantial confusion as to whether the ADA requires a "regarded as" disability to qualify as an actual disability if it actually existed. Theran, supra note 47, at 186-87. Most courts interpret this as essentially requiring a plaintiff with a "regarded as" claim to prove that she is in fact disabled. Id. at 187.

See, e.g., Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697 703-04 (S.D.N.Y. 1997) (considering and rejecting an ADA claim based on evidence of difficulty engaging in a variety of everyday major life activities); Ridge, 77 F. Supp. 2d at 162-64 (considering whether the employer regarded the employee as substantially limited in the major life activities of walking and working). It is important to note that limitations on a person's ability to perform everyday manual activities, which are considered to be major life activities, should not be evaluated in the context of the major life activity of working. Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 200-01 (2002). The Court discussed the "major life activities" analysis:

[T]he central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job .... [A]n inability to perform a specific job always can be recast as an inability to perform a class of tasks associated with that specific job.

Id. However, there has been general agreement about what other activities qualify as "major life activities." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, supra note 52, §902.3(a). Generally, major life activities are those that the average person can perform without substantial difficulty. Id.

Solovay, supra note 11, at 154; see also Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1154 (Cal. 1993) (holding that a morbidly obese plaintiff failed to establish that her weight was a perceived physical handicap when she asserted that she was a healthy, fit individual). Even if an employee asserts that he or she is fully capable of a job, and presents evidence that an employer stated that he or she would be able to do a better job if he or she lost weight, this would not be sufficient for a viable claim under the ADA. E.g., Hazeldine, 954 F. Supp. at 705. In Hazeldine, however, evidence of discrimination was apparent. The employer suggested "lite" snacks, limited the employee's dinner money compared to other employees, and blamed a gallbladder operation and subsequent absence from work on the employee's weight. Id. at 701.
The court's general approach to the ADA or the Rehabilitation Act may affect the plaintiff's claim. A court may have an expansive or limited view of the necessary requirements to prove a "substantial limitation" or what constitutes a "major life activity." Also, a decision affecting the scope or application of the ADA or Rehabilitation Act, though unrelated to weight discrimination, may affect a court's treatment of an overweight claimant.

Claims litigated under state disability statutes also provide varying results. State statutes naturally differ according to the unique phrasing of each statute. For example, New Jersey's LAD lacks a "major life activities handicap" requirement. Comparatively, the California state law prohibiting disability discrimination requires a plaintiff to show that obesity affects one or more of her body systems. The New Jersey appellate court held that its state statute covered obesity because obesity is a medically demonstrable condition. The California Supreme Court

147. SOLOVAY, supra note 11, at 135. While the ADA and EEOC guidelines interpreting the ADA are clear, a variety of factors enter into a court's determination of whether a person's weight becomes an impairment. Id.

148. Compare Hazeldine, 954 F. Supp. at 699 (holding that a plaintiff is not substantially limited in any major life activities although obesity prevents her from walking long distances (one block), lifting heavy objects, engaging in running or jogging, bending, or kneeling), with Ridge, 77 F. Supp. 2d at 157 & n.2 (finding that a plaintiff substantially limited in a major life activity because shoulder tendonitis interfered with her ability to lift).

149. See SOLOVAY, supra note 11, at 136. Pursuant to a recent Supreme Court decision, a potential employer is now permitted to evaluate corrective or preventative measures a person may use to alleviate an impairment in determining whether that person is substantially limited in a major life activity. Id. The decision has been criticized by disability-rights activists because an employer may now be able to refuse a person a job because of the disability, but the potential employee may no longer be "disabled enough" for ADA protection. Id. This could affect the rights of overweight workers who could use medication to alleviate some of the side effects of their weight, including medication for high blood pressure. Id.

150. See Kristen, supra note 7, at 93-98 (discussing New York, New Jersey, and California antidiscrimination laws). However, these laws may be more effective in providing relief to overweight plaintiffs than either the ADA or the Rehabilitation Act. Id. at 93.

151. See id. at 93-98.


153. See Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1153-54 (Cal. 1993) The court noted that judicial and executive interpretations of the laws on which the California statute was based, including the ADA, "reject[ed] the argument that weight unrelated to a physiological, systemic disorder constitutes a handicap or disability." Id. at 1153. However, there was absolutely no evidence in the record to show that Ms. Cassista's weight resulted from a condition or disorder affecting her body systems. Id. at 1154.

154. Gimello, 594 A.2d at 276. The New York City law prohibiting discrimination on the basis of disability is similar. See supra notes 102-04 and accompanying text.
required a plaintiff to prove that her employer regarded a condition underlying her weight as substantially limiting her ability to work.\footnote{155} The California approach is more difficult to satisfy than an approach that merely requires the plaintiff to show a perception of disability based on weight.\footnote{156} Further, the California law prevents the plaintiff from simply proving obesity to be covered by the statute.\footnote{157}

Therefore, plaintiffs across the country face different standards when bringing a disability claim under state statutes.\footnote{158} A disability claim brought in one state may be won against a nation-wide or multi-state employer without affecting the employer’s obligations to plaintiffs in other states.\footnote{159} Also, plaintiffs with weight discrimination claims in the same state may have different levels of protection depending on what city or part of the state in which they live.\footnote{160}

Substantial differences in the manner in which courts apply disability law to obesity leave overweight people with inconsistent and unpredictable legal protection.\footnote{161} This uncertainty may cause employees to hesitate when determining whether to pursue a valid weight

\footnote{155} SOLOVAY, supra note 11, at 153-54. California law defines “physical disability” in part as

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, . . .

(B) Limits a major life activity. . . .

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer . . . .

(4) Being regarded or treated by the employer . . . as having, or having had, . . . any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer . . . as having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

\footnote{156} CAL. GOV’T CODE § 12926(k)(1)-(5) (West Supp. 2004).

\footnote{157} SOLOVAY, supra note 11, at 153-54. For example, a plaintiff would have to prove that an employer regarded her as having a metabolic function impairment or eating disorder that in turn caused the plaintiff to be unable to perform her job. \textit{Id.} at 153.

\footnote{158} \textit{Id.} at 153-54. The result of this analysis is that weight alone would never be protected unless a plaintiff could meet this additional burden of proof. \textit{Id.}

\footnote{159} See generally SOLOVAY, supra note 11; Kristen, supra note 7, at 93-98.

\footnote{160} SOLOVAY, supra note 11.

\footnote{161} \textit{Id.}; see Theran, supra note 47, at 182-83.
A Growing Problem

These inconsistencies mean that overweight people cannot rely on disability law to adequately protect their rights in the workplace.\(^{163}\)

### B. Advantages of Local Statutes Preventing Discrimination Against Employees on the Basis of Weight

Local antidiscrimination laws have more promise than federal or state disability laws. For example, when bringing a suit, Michigan citizens rely on a clear statute and case law.\(^{164}\) Because the Elliott-Larsen Act tracks Title VII legislation and the ADEA, plaintiffs have a reliable framework to gauge how the law will operate and develop.\(^{165}\) A plaintiff may bring a claim under two legal frameworks, depending on which fits his or her particular situation.\(^{166}\)

A plaintiff may, as one of two options, state a claim by showing that he or she: (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified to perform the job from which he was rejected or terminated, and (4) was replaced by a person outside the protected class or was treated differently than a similarly situated employee outside the protected class.\(^{167}\) If the plaintiff establishes a claim, the burden shifts to the defendant to articulate a legitimate non-discriminatory purpose for its action.\(^{168}\) If the employer makes such a showing, the plaintiff then has the burden to prove the defendant’s stated motive was mere pretext and that discrimination formed the basis of the employer’s action.\(^{169}\)

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162. Cf. SOLOVAY, supra note 11, at 129 (stating that the existence of only a few weight-based discrimination statutes forces plaintiffs to bring claims under general federal or state disability laws).

163. See id. at 162-63; see also Carey Goldberg, Fat People Say an Intolerant World Condemns Them on First Sight, N.Y. TIMES, Nov. 5, 2000, at 36 (arguing that only weight-specific antidiscrimination statutes will protect overweight people from weight-based discrimination in the workplace).

164. Kristen, supra note 7, at 101-05.

165. Id. at 104 (describing how the Michigan statute follows Title VII legislation). Claims brought under the ADEA can also use either of these two approaches. Hein v. All Am. Plywood Co., 232 F.3d 482, 488 (6th Cir. 2000).


168. Hein, 232 F.3d at 489.

169. Id.
Alternatively, plaintiffs may successfully state a claim by supplying direct evidence of an employer's weight-related animus. The plaintiff bears the burden of persuading the trier of fact that the employer's illegal "discriminatory animus was causally related to" the employment action. In addition, the plaintiff must introduce evidence establishing his or her qualifications for employment. Unlike the circumstantial evidence claims, even if the employer provides proof of a non-discriminatory reason, the issue still goes to the fact-finder. The statute's approach recognizes that weight discrimination is more likely to be action based on a negative stereotype than based on a belief that an overweight worker is incapable or substantially limited in a major life activity.

Other local laws show promise. The passage of the Santa Cruz and San Francisco laws indicates public awareness and support for prohibitions against weight discrimination. Although the public, especially in San Francisco, debated the pros and cons of protecting employees on the basis of weight, employers generally have not complained about the law. The phrasing of these laws is similar to that of the Michigan law, indicating that these laws will likely also be effective.

The results of the cases brought under specific weight discrimination laws show the advantages of such statutes. For example, the San Francisco law caused Jazzercise to reevaluate negative image stereotypes about weight and fitness. Instead of having to prove a non-existent disability, Jennifer Portnick only had to prove that an employer acted on a negative weight stereotype unrelated to a bona fide occupational qualification.

170. See Lamoria, 584 N.W.2d at 593-94.
171. Id. at 594.
172. Id.
173. Id. This process is referred to as a "mixed-motive" analysis. Id. In a "mixed-motive" analysis, a plaintiff may present direct evidence that discrimination motivated an employer's action, despite direct evidence showing legitimate motivations also existed. See 42 U.S.C. § 2000e-2(m) (2000); see also Kristen, supra note 7, at 102-03 & n.314.
174. Cf. SOLOVAY, supra note 11, at 164 (stating that overweight people "are not generally protected from pure prejudice [in the workplace]").
175. Id. at 243-44.
176. See id.; Goldberg, supra note 163.
177. Kristen, supra note 7, at 101, 105.
178. See Fernandez, supra note 1.
179. Id. San Francisco's Compliance Guidelines To Prohibit Weight and Height Discrimination are illuminating:

Employment decisions must be based on merit or fitness for the position. Weight or height standards may not be used unless weight or height is a bona fide occupational qualification. Weight may not be used as a measure of health,
Using the same approach as the San Francisco Law, Michigan’s Elliott-Larsen Act allows a plaintiff to prevail on a weight discrimination claim by showing illegal disparate treatment between a qualified, moderately overweight person and a thinner person who is stereotypically “thin” or “fit.” This approach eliminates the need to prove a “regarded as” disability in every weight discrimination case. Plaintiffs still have the option to provide direct evidence that an employer acted with illegal discriminatory animus.

Additionally, the fact that these laws have not been litigated extensively indicates their promise. By encouraging mediation and settlements, plaintiffs and employers work together rather than against one another, as they do in an adversarial setting. The laws motivate

fitness, endurance, flexibility, strength, character or self-control. Individuals of all sizes must be provided an equal opportunity to demonstrate their knowledge and ability. The employer advocating the use of a weight or height standard bears the burden of proving the standard is a bona fide occupational qualification.

HUMAN RIGHTS COMM’N, supra note 10, at 6, see also Fernandez, supra note 1. Airlines have been able to legally maintain weight requirements that are unrelated to health and safety concerns. Theran, supra note 47, at 160. These standards are legal unless they affect some other protected characteristic, such as sex. Id. at 160-61. Presumably, these standards would fail under a law like San Francisco’s, which prohibits discrimination on the basis of weight. See HUMAN RIGHTS COMM’N, supra note 10, at 3.

180. See Hein v. All Am. Plywood Co., 232 F.3d 482, 489 (6th Cir. 2000); Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 594 (Mich. Ct. App. 1998) (per curiam). An example of “disparate treatment” would occur if an employer refused to hire obese job applicants. 36 AM. JUR. 2D Discrimination Against the Obese § 3 (1983). This is different from a “disparate impact” claim, which would occur if an employer had a policy of hiring only attractive employees, and the result of the policy being that no obese employees were hired. Id. Obviously, Jennifer Portnick was a qualified applicant, being a certified acrobics instructor with the ability to teach back-to-back classes. Fernandez, supra note 1. Notwithstanding her qualifications, she was treated differently than a thinner applicant who “looked fit.” See id.

181. See Lamoria, 584 N.W.2d at 594. In Jennifer Portnick’s case, Jazzercise did not perceive that she had any disability; they simply disliked her weight. Fernandez, supra note 1.

182. See Lamoria, 584 N.W.2d at 594. The example of evidence of a discriminatory motive would be something like a racial epithet. Id. at 595. Although not applicable to the Jazzercise case, this approach would help other overweight plaintiffs make a case. For example, Mr. Gimello would have an additional cause of action, and Ms. Hazeldine’s case may not have been dismissed. Gimello v. Agency Rent-A-Car Sys., Inc. 594 A.2d 264, 268-69 (N.J. Super. Ct. App. Div. 1991 (noting supervising employer made many derogatory comments about Gimello’s weight although he was an exceptional employee); see Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 699, 701, 705 (S.D.N.Y. 1997) (finding plaintiff had no cause of action because she had neither an actual disability, nor did her employer regard her as disabled although he made negative comments and believed her weight interfered with her work).

183. Cf. SOLOVAY, supra note 11, at 244 (noting that Santa Cruz has not had any formal or private enforcements of the anti weight-discrimination law); Kristen, supra note
employers to alter discriminatory policies and may also stimulate education in the workplace about weight-related issues. To avoid weight discrimination, these laws encourage businesses to make reasonable accommodations for people’s weight “in structure, policy, practice or procedure.”

C. Protection Through Disability Laws Does Not Adequately Address Ancillary Issues to Weight Discrimination

Protection of overweight people through disability laws fails to adequately address many ancillary issues to weight discrimination. Overweight people frequently belong to other protected classes, such as racial minority groups. More women than men are victims of weight

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7, at 101 (noting that only eight to ten cases of weight discrimination had been brought under the Elliott-Larsen Act); Mason, supra note 4, at 354 (noting that in its first five years of existence, “the Michigan civil rights department . . . resolved weight-based complaints without resort to adversarial proceedings”).

184. See, e.g., HUMAN RIGHTS COMM’N, supra note 10, at 4-6. The activists who worked to pass laws prohibiting weight discrimination have a “common strategy—education.” SOLOVAY, supra note 11, at 237. Education about weight and weight discrimination is an important step in combating prejudice and negative stereotypes. Id.


186. See SOLOVAY, supra note 11, at 129-30. Weight-related issues are increasingly being recognized by legislatures. Connolly, supra note 23. State lawmakers have filed over 140 bills targeted at problems relating to obesity. Id. Some of the bills aim to eliminate advertising of candy and sweets, advocate taxation of fatty foods and items of sedentary living, and require fast food restaurants to post nutrition information. Id. Due to the $117 billion spent each year on the medical expenses of obesity, an increasing number of experts argue that health insurance premiums should be correlated to weight. Id. Former Health and Human Services Secretary Tommy G. Thompson asked President Bush’s lawyers to draft a bill “that would not run afoul of anti-discrimination laws.” Id. However, the only current national antidiscrimination protection for the overweight comes through the ADA and the Rehabilitation Act. See supra note 47 and accompanying text. The protection of the overweight on the basis of these laws is questionable. See discussion supra Parts III.A, C.

187. See SOLOVAY, supra note 11, at 123-26; see also Roehling, supra note 15, at 990-91. Age-adjusted prevalence of the percentage of overweight and obese plaintiffs is generally higher in racial/ethnic minorities than in Whites. NIDDK, supra note 5. For example, 77.3% of Non-Hispanic Black women, 71.9% of Mexican-American women, 57.3% of Non-Hispanic White women, 60.7% of Non-Hispanic Black men, 74.7% of Mexican American men, and 67.4% of Non-Hispanic White men are considered
discrimination. Additionally, overweight people are more likely to be in a lower socioeconomic class, partly due to the fact that their weight may effectively decrease potential salaries. The reasons for these overlaps may be cultural, physical, or stereotypical.

Disability law does not consider these overlaps. Disability law protection does not account for the reality that employers are more likely to discriminate against overweight women on the basis of appearance rather than on the basis of a "regarded as" disability. It also fails to address the fact that multiple bases for an employer to discriminate against a plaintiff may exist, although none are based on a "regarded as" disability.

Studies show that weight bias may exceed biases associated with other characteristics, making protection on this basis paramount. A person belonging to several classes frequently discriminated against may establish a discrimination claim on the basis of being a member of an existing protected class. Even if a plaintiff won a discrimination case

188. See Mason, supra note 4, at 344-45 (stating that "[m]ost obese Americans are women"). The lack of overweight women holding positions of power results in a lack of role models for overweight women facing discrimination in the workplace. SOLOVAY, supra note 11, at 107. The lack of overweight women holding positions of power also results in reinforcing negative stereotypes and perpetuating the cycle of employment discrimination against the overweight. Id.

189. SOLOVAY, supra note 11, at 106; Kristen, supra note 7, at 64; Mason, supra note 4, at 344-45. Especially for women, there is a distinct connection between being overweight and socio-economic conditions. Overweight women are "ten to thirty times more likely to live in poverty." SOLOVAY, supra note 11, at 106. The consequences of being overweight in an image-conscious society may be the reason these women become poor. See id. Rates of obesity are highest for non high-school graduates (25.3%) and lowest for college graduates (14.3%). Theran, supra note 47, at 148.

190. See SOLOVAY, supra note 11, at 129.

191. See id. at 105; Roehling, supra note 15, at 999-1000. An obese woman noted that corporate America was not the place for her. Minority Report, WASH. POST MAG., Oct. 12, 2003, at, 16, 19. However, because of the extreme lack of qualified special education teachers, she was welcomed into a school district. Id.

192. See Roehling, supra note 15, at 982-83, 998-1000.

193. See id. at 983.

194. Kristen, supra note 7, at 98-100. Several of the plaintiffs in cases described in this Comment brought multiple claims. For example, Ann Ridge brought claims under the ADA and the Age Discrimination in Employment Act of 1967. Ridge v. Cape Elizabeth Sch. Dep't, 77 F. Supp. 2d 149, 152 (D. Me. 1999). Grace Hazeldine brought a claim under the ADA and a sexual harassment claim. Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 698-99 (S.D.N.Y. 1997). The Michigan law stating that weight is a protected class would use the same framework to address all of these claims. Hein v. All Am. Plywood Co., 232 F.3d 482, 489 (6th Cir. 2000) (stating that the McDonnell Douglas framework would be applied to both the weight and age discrimination claims brought by plaintiff).
because her rights as a member of a protected class were violated, the underlying weight discrimination remained unremedied.\textsuperscript{195}

The difficulties of fitting weight into a disability law framework create obstacles for workers who face weight discrimination.\textsuperscript{196} "Overweight" exists in varying degrees.\textsuperscript{197} Courts will likely use disability laws to protect the morbidly obese.\textsuperscript{198} However, moderate obesity or just being overweight, while frequently causing employment discrimination, will almost never be perceived as a disability.\textsuperscript{199}

The class of moderately obese and overweight employees outnumbers the class of morbidly obese employees.\textsuperscript{200} Plaintiffs face substantial difficulty in persuading a judge or jury that an employer regards their

\textsuperscript{195} See Kristen, supra note 7, at 98-100; see also Roehling, supra note 15, at 982-83, 985, 997-99.

\textsuperscript{196} SOLOVAY, supra note 11, at 145, 149.

\textsuperscript{197} SOLOVAY, supra note 11, at 146. The Department of Justice has indicated, "It is generally accepted that morbid obesity, which is defined as body weight 100 percent over normal weight, is an impairment." Id. (quoting Letter from Merrily A. Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division, Department of Justice, to Saint Paul, Minnesota).

\textsuperscript{198} SOLOVAY, supra note 11, at 149. However, the medical establishment considers both simple obesity and morbid obesity to be impairments. Id. Courts generally defer to the medical establishment, but seem to substitute a cultural view of weight for one that should be legal and medical. Id. at 149-50. In some cases, if a plaintiff loses weight during the period he is facing discrimination, it may become an issue when he brings a case. See Butterfield v. New York, No. 96Civ.5144(BDP)LMS, 1998 WL 401533, at *3 (S.D.N.Y. July 15, 1998). During the period when he was discriminated against, Mr. Butterfield's weight dropped from over 400 pounds to approximately 255 pounds. Id. The court was unsure if Mr. Butterfield was morbidly obese throughout the period he faced discrimination because of disagreement over the definition of morbid obesity, and whether it should be defined by an individual's weight at a given time or by the existence of a "[c]ontinuing metabolic or genetic problem." Id. at *4. However, the parties did not adequately address the issue, and there was considerable inconsistency in the record as to whether Mr. Butterfield was five feet seven inches tall or six feet seven inches tall. Id. *n.5. He was allowed to proceed on a "regarded as" disability claim. Id. at *13.

\textsuperscript{200} See NIDDK, supra note 5. Some studies indicate that this may change, as morbid obesity is the fastest-growing segment of the overweight population. Roland Sturm, Increases in Clinically Severe Obesity in the United States, 1986-2000, 163 ARCHIVES INTERNAL MED. 2146, 2146-48 (2003). In fact, severe obesity has quadrupled to about one in fifty adult Americans. Id. However, this potential change in the overweight population does not affect the need for a statute to protect workers on the basis of weight. While morbidly obese plaintiffs like Joseph Gimello may be able to bring a claim under disability law, plaintiffs such as Grace Hazeldine may not. Compare Gimello v. Agency Rent-A-Car Sys., Inc., 594 A.2d 264, 266, 272-73 (N.J. Super. Ct. App. Div. 1991) (allowing morbidly obese man to show that he is disabled under New Jersey state disability law), with Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 703, 705 (S.D.N.Y. 1997) (rejecting ADA claim of morbidly obese woman because she was not substantially limited in a major life activity, nor regarded as substantially limited in a major life activity).
weight as substantially limiting a major life activity. Also, a faulty presumption that moderate obesity or being overweight is a mutable or easily preventable condition may preclude disability law coverage.

Overweight employees who are not morbidly obese still face employment discrimination. They may be victims of weight standards that relate to appearance rather than job qualifications.

201. SOLOVAY, supra note 11, at 152-53. In fact, they rarely make it to this stage of analysis because the court will refuse to consider their moderate overweight condition an impairment under disability statutes. Id. at 152.

202. See Green v. Union Pac. R.R. Co., 548 F. Supp. 3, 5 (W.D. Wash. 1981) (holding that the plaintiff was not handicapped under Washington disability law because "plaintiff's obesity was not an immutable condition"); Mason, supra note 4, at 346 (stating that weight is an "immutable trait"). A claimant whose condition may be treated by medicine, but precludes him from meeting the qualifications for a certain job, will not be protected by the ADA. Murphy v. United Postal Serv., Inc., 527 U.S. 516, 519, 524-25 (1999). A commercial driver's high blood pressure may have been treatable by medication, but prevented him from obtaining the required DOT certification to be a driver. Id. at 523-24. The Court held this failure to meet regulations did not mean that United Postal Service regarded Mr. Murphy as disabled, only that he was not certifiable under DOT regulations, and therefore could not be employed. Id. at 524-25. Similarly, the Supreme Court has held that a person claiming discrimination based on a disability can be evaluated in the context of measures he or she could take to correct or mitigate a physical or mental impairment. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999). In Sutton, the plaintiffs suffered from severe myopia that could be completely remedied with corrective lenses. See id. at 475. The Court held that the ADA does not require that an individual be evaluated in an uncorrected state. Id. at 482. For an excellent argument that these cases and another recent Supreme Court decision, Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999), negatively affect the protection the ADA affords to even those with obvious disabilities, see Bonnie Poitras Tucker, The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages, 52 ALA. L. REV. 321 (2000). If a law prohibited discrimination on the basis of weight, the immutability of weight would be irrelevant. Kristen, supra note 7, at 77. Protecting people on the basis of immutable traits is both over and underinclusive. Id. at 77-78. For example, eye color and baldness are both immutable traits. Id. at 77. However, these traits do not need the protection of an antidiscrimination law. Id. Using immutability as a standard for a protected class may not protect people with certain mutable traits that have been historically subject to discrimination. Id. at 78.

203. SOLOVAY, supra note 11, at 145; Mason, supra note 4, at 352-53.

204. SOLOVAY, supra note 11, at 159-160 (discussing weight requirements for airline stewardesses); see also Lynch, supra note 185, at 212-40 (discussing requirements and legal remedies for flight attendants and passengers who are not obese but may face unreasonable height and weight standards). Over thirty-five years ago, a New York court effectively dealt with an unreasonable weight standard in In re Parolisi v. Board of Examiners, 285 N.Y.S.2d 936 (N.Y. Spec. Term 1967). In this case, the school board denied a license to Ms. Parolisi, a substitute teacher, because she failed an objective weight test. Id. at 937-38. However, Ms. Parolisi had an excellent record during her three terms in the school district. Id. at 937. The court expressly rejected the idea that a person's ability to teach and maintain order could be inferred from a health requirement based on an objective weight standard. Id. at 939-40. By refusing to evaluate Ms. Parolisi's abilities in a subjective manner, her employer had violated the New York State
who are not actually overweight may still suffer weight discrimination.\textsuperscript{205} Without legal protection on the basis of weight, moderately overweight people are left with little legal recourse when faced with employment discrimination.\textsuperscript{206} This discrimination negatively impacts the American workplace, which employs an increasing number of overweight workers.\textsuperscript{207}

Additionally, protection through disability law perpetuates negative myths about obesity by requiring plaintiffs to prove that weight constitutes a physical impairment that employers regard as a disability.\textsuperscript{208} In fact, this approach is full of "ideological objections."\textsuperscript{209} Many overweight workers maintain that their weight does not make them less capable employees than their thinner counterparts.\textsuperscript{210} As in Jennifer

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\item\textsuperscript{205} Cf. SOLOVAY, \textit{supra} note 11, at 159 (stating that "even thin people \ldots can be perceived as being too fat"). Certain professions, such as law enforcement and firefighting may require height and weight standards as the basis for their employment. \textit{See id.} at 158. Another relevant case involved height and weight standards for laborers in the Department of Parks and Recreation for the City of Pittsburgh. Civil Serv. Comm'n v. Pa. Human Relations Comm'n, 591 A.2d 281, 281 (Pa. 1991). Perry DeMarco was offered a position with the Civil Service Commission "contingent upon his losing thirty-seven pounds in nineteen weeks." \textit{Id.} at 281-82. He did not lose the weight and was suspended without pay. \textit{Id.} at 282. However, the weight requirement was eliminated a few months later, and DeMarco was called back to employment. \textit{Id.} He sued for lost wages under Pennsylvania law and lost because he could not prove his obesity was an impairment or that his employer regarded him as disabled. \textit{Id.} at 284. The dissent characterized the weight requirement as a standard that was unrelated to the job that the employer used to deny employment to a well-qualified applicant. \textit{Id.} at 285 (Papadakos, J., dissenting).
\item\textsuperscript{206} \textit{See Kristen, supra} note 7, at 91; \textit{see also} Tharan, supra note 47, at 182-83.
\item\textsuperscript{207} \textit{See supra} Part IB.
\item\textsuperscript{208} SOLOVAY, \textit{supra} note 11, at 129-33. Part of the overweight community, having fought to change negative stereotypes about weight, feels that using disability laws as a basis for legal protection actually adds to the negative perceptions. \textit{Id.} at 129. Such members of the overweight community believe that their bodies are not causing the discrimination problems; rather, society's misconceived notion is the source. \textit{Id.}
\item\textsuperscript{209} Goldberg, \textit{supra} note 163; \textit{see also} Tharan, supra note 47, at 189 ("A judgment that all individuals who are above, or even 20\% above the ideal weight for their height are 'disabled' plays squarely into the stereotypes and prejudices against the overweight that perpetuate weight-based discrimination in the first place.")
\item\textsuperscript{210} SOLOVAY, \textit{supra} note 11, at 129. Jennifer Portnick had this same attitude. \textit{See Fernandez, supra} note 1. In a similar situation, the Philadelphia Electric Company (PECO) rejected employment applicant Joyce English, a morbidly obese woman. Phila. Elec. Co. v. Pa. Human Relations Comm'n, 448 A.2d 701, 702-03 (Pa. Commw. Ct. 1982). Although she was well-qualified for the position, she failed to meet the job's weight standards. \textit{Id.} The court held that her claim failed under Pennsylvania disability law because there was "not even a scintilla of evidence that \ldots Ms. English was handicapped or disabled in any manner." \textit{Id.} at 707. She had none of the diseases or conditions that she might have been susceptible to as a morbidly obese woman. \textit{Id.} The condition of morbid obesity alone was not enough to give her standing under the law. \textit{Id.}
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Portnick's case, her weight was not an impairment in any sense; nor did Jazzercise regard her weight as a disability. Jazzercise simply disliked Portnick's appearance because she did not match the stereotypical vision of "fit." Of course, Jazzercise later realized that its definition of "fit" needed to expand.

Not all workplace discrimination relates to hiring or firing. Workplace discrimination claims also may be based on harassment. Harassment is less likely to be based on obesity as a "regarded as" disability than it is on general animosity relating to negative weight stereotypes. The harassment may consist of pressure to diet, weight jokes, or more serious pranks. Workplace harassment has negative

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211. See Fernandez, supra note 1. Jennifer Portnick did have teacher certification. Id.
212. See id. It is unlikely that Portnick would have won a disability claim because of the difficulty of proving that Jazzercise regarded her weight as substantially limiting in a major life activity. Portnick would have had a claim under Michigan's Elliott-Larsen Act, using the McDonnell Douglas approach. She was a member of a protected class (weight), subject to an adverse employment action of refusal to hire, qualified to perform the job as a certified instructor, and treated differently than other certified instructors. Hein v. All Am. Plywood Co., 232 F.3d 482, 489 (6th Cir. 2000) (laying out the requirements to state a claim); see Fernandez, supra note 1 (providing facts that would be used if Ms. Portnick's case had been brought to court).
213. Fernandez, supra note 1. In fact, Jazzercise wanted more than a "fit" appearance, they wanted her to have a higher muscle to fat ratio so that she would look leaner than the general public. Do Fitness Instructors Have To Be Thin, ABC NEWS, at http://abcnews.go.com/US/story?id=91866&page=1 (last visited Feb. 16, 2005).
215. Kristen, supra note 7, at 64-65.
216. Id. at 64. Other work-related discrimination includes wage discrimination, infrequent promotions, and unfavorable job conditions. Id. A notable case of harassment based on weight was brought by Brian Butterfield, a corrections officer in the New York State Department of Correctional Services. Butterfield v. New York, No. 96Civ.5144(BDP)LMS, 1998 WL 401533, at *1 (S.D.N.Y. July 15, 1998). Mr. Butterfield was a morbidly obese claimant who had undergone gastric bypass surgery, dropping his weight from over 400 to 255 pounds. Id. at *3. Mr. Butterfield was subjected to numerous incidents of harassment on the job, including inappropriate caricatures depicting an overweight cartoon character posted throughout the corrections facility by his coworkers, a mysterious substance in his soda that made him ill, and cheese sprayed in his locker. Id. at *4-5. After he filed a charge of harassment, the acts continued; his time card disappeared and cars were parked very close to his vehicle in the parking lot to prevent him from entering it. Id. at *5. Mr. Butterfield even received a dead rat in an envelope addressed to him. Id. The U.S. District Court for the Southern District of New York held that Mr. Butterfield was not actually disabled under the ADA or Rehabilitation Act because he was not substantially limited in a major life activity. Id. at *9. The court did allow Mr. Butterfield to pursue a claim that his employer regarded him as disabled and harassed him on this basis. Id. at *12-13. His claim under Title VII failed because weight is not a protected class under that statute. Id. at *13.
218. Kristen, supra note 7, at 64; see also supra note 216 (detailing examples of harassment). In one case, an employee was constantly pressured to lose weight, taunted
effects on the employee's job performance and confidence. Based on federal case law, plaintiffs are able to bring workplace harassment claims under both the ADA and the Rehabilitation Act. The courts analyze these cases in accordance with hostile workplace cases under Title VII.

Similarly, an employer may discriminate against an overweight employee by increasing work requirements, thus making the job impossible for anyone to perform. In these circumstances, disability law would not apply because the employer obviously believes that the employee is capable of normal job responsibilities and does not regard the person's weight as a disability. Instead, because of an apparent job ability combined with weight, the employer chose to increase the job's difficulty.

with demeaning jokes, "threatened with demotion if he did not lose weight, ridiculed for his weight by supervisors in the presence of fellow employees, and pressured into purchasing so-called 'diet cookies' from a supervisor." Greene v. Seminole Elec. Coop., 701 So. 2d 646, 648 (Fla. Dist. Ct. App. 1997). Harassment is not limited to the workplace. Overweight people may be victims of verbal assaults in public places, such as restaurants. Goldberg, supra note 163. An overweight patron eating at a restaurant was verbally assaulted "for eating all the food in [the] restaurant." Id. The neighboring restaurant patron then threw a lighted cigarette at the overweight restaurant patron and made fun of her for almost crying. Id. Verbal abuse against overweight people is prevalent in society.

Id.: see, e.g., Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 593 (Mich. Ct. App. 1998) (per curiam). A law protecting employees on the basis of weight would protect these plaintiffs without requiring them to prove a disability. They would only need to prove that they were a member of the protected class of overweight people. Hein v. All Am. Plywood Co., 232 F.3d 482, 489 (6th Cir. 2000). As noted above, weight-bias alone is likely to prompt discrimination.

The case illustrating this proposition is Riehle v. Stone, No. 94-1649, 1994 WL 659156 (6th Cir. Nov. 22, 1994). Riehle brought a claim under the Rehabilitation Act, alleging that because of her weight, her supervisors deliberately made her job impossible to perform. Id. at *1, *2. If Riehle's employer was making her job more difficult than the normal requirements, she was obviously viewed as perfectly capable of performing the job. See id. at 2. This would preclude her from protection under the statute although "she suffer[ed] from obesity, diabetes, and carpal tunnel syndrome." Id.
VI. THE FEDERAL GOVERNMENT NEEDS TO SHOULD THE BURDEN TO ADEQUATELY PROTECT OVERWEIGHT WORKERS FROM DISCRIMINATION

A. The Current Legal Scheme Protecting Overweight Workers Is Ineffective

To effectively prevent weight discrimination, a federal scheme of protection that is not based on disability law is necessary. Current disability law fails to provide effective, uniform, or reliable protection for overweight workers. Local anti-weight discrimination laws are more effective because they reflect the general feeling of the community, imitate a successful scheme of legislation protecting other civil rights, encourage cooperation and preventative training, and adequately address the problem.

Obese or overweight people are not necessarily...

225. See SOLOVAY, supra note 11, at 162 (stating that "[c]overage under the ADA and other disability laws is inconsistent"). A question may arise as to the source of authority for a federal statute protecting people on the basis of weight. Most antidiscrimination laws protect the "discrete and insular minorit[ies]" mentioned in the Caroleene Products footnote. Theran, supra note 47, at 196-97. As they become a majority of the population, overweight people should not be described as a "discrete" group. NAT’L HEART, LUNG, & BLOOD INST., supra note 14. While overweight people face discrimination, no court has ever held that discrimination against the obese qualifies for "heightened scrutiny" under the Equal Protection Clause. United States v. Santiago-Martinez, 58 F.3d 422, 423 (9th Cir. 1995). Any court facing the issue would be unlikely to afford protection to the obese. See id. However, another social group, the disabled, has received federal statutory protection through the ADA. Theran, supra note 47, at 196-97. The ADA was passed not because the disabled were a discrete and insular minority, like women and racial minorities, but rather because there was a pressing need to combat the extensive and well-proven discrimination against the disabled. Id. at 197-98. The ADA would then provide a different framework allowing protection for any group experiencing well-proven, systematic, and widespread discrimination. Id. at 198. Weight-based discrimination falls into this framework and therefore could be protected by an antidiscrimination law. Id. at 198-99.

226. SOLOVAY, supra note 11, at 114.

227. See supra notes 175-78 and accompanying text. The laws in Washington, D.C., Santa Cruz, and San Francisco appear to be untested in court. Kristen, supra note 7, at 105 (noting that the Santa Cruz law has not been tested); HUMAN RIGHTS COMM’N, supra note 125 (noting the mediation of cases under the San Francisco law); see supra note 128 (citing the lack of case law under the Washington D.C. law). Claims brought under Michigan’s Elliott-Larsen Act can use either a "mixed-motive" or McDonnell Douglas framework. Hein v. All Am. Plywood Co., 232 F.3d 482, 488-89 (6th Cir. 2000); Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 593-94 (Mich. Ct. App. 1998) (per curiam). If a federal law established these benefits nation-wide, a trickle-down effect could occur in state law. Theran, supra note 47, at 200.
disabled, and plaintiffs of all weights deserve protection from discrimination.\textsuperscript{228} As demonstrated in the \textit{Cassista} case, a plaintiff asserting that she is healthy and capable may automatically lose her case under disability legislation.\textsuperscript{229} Also, recovery for weight as a "regarded as" disability perpetuates the stereotype of overweight people as unhealthy or incapable of important or meaningful work.\textsuperscript{230} Disability laws fail to adequately address issues ancillary to weight discrimination, including the substantial overlap with other protected classes and the protection of all overweight people, not just the morbidly obese.\textsuperscript{231} By allowing overweight people to see themselves as equal to others and guaranteeing them equal opportunity in the workplace, they will be encouraged to "invest[] in their own human capital."\textsuperscript{232}

\textbf{B. The Benefits of a National Law Prohibiting Weight Discrimination}

A national law prohibiting weight discrimination would provide the stability and effectiveness for overweight workers that national disability laws fail to provide.\textsuperscript{233} Also, a national law would achieve the same worthwhile and effective goals of local laws: protecting overweight people as a class.\textsuperscript{234} A national standard would insure that the effects of a local anti-weight discrimination law are distributed nation-wide.\textsuperscript{235} For example, Jennifer Portnick's case changed the nation-wide standards of Jazzercise, even though her case probably would have failed under the ADA or Rehabilitation Act, despite the fact that they are the only nation-wide protection currently available to overweight workers.\textsuperscript{236}

\begin{footnotesize}
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\item \textsuperscript{228} \textit{See SOLOVAY, supra} note 11, at 149 ("Modern courts tend to rule that . . . 'moderate' fat is not covered as a disability unless it is accompanied by another disabling impairment.").
\item \textsuperscript{229} \textit{Id.} at 154.
\item \textsuperscript{230} \textit{See id.} at 131; Kristen, \textit{supra} note 7, at 82.
\item \textsuperscript{231} \textit{See supra} Part III.C. In fact, dramatic weight loss that draws attention to a person's weight may be a basis for discrimination and harassment in the workplace. \textit{See Butterfield v. New York}, No. 96Civ.5144(BDP)LMS, 1998 WL 401533, at *3 (S.D.N.Y. July 15, 1998). In this case, protection on the basis of weight, and not disability, is important. If Mr. Butterfield could not prove that his weight continued to constitute an impairment, the plaintiff would lose on both an actual and "regarded as" disability claim. \textit{See id.} at *12-13.
\item \textsuperscript{232} Kristen, \textit{supra} note 7, at 71; \textit{see also SOLOVAY, supra} note 11, at 106; Mason, \textit{supra} note 4, at 341-42, 346.
\item \textsuperscript{233} \textit{See SOLOVAY, supra} note 11, at 114.
\item \textsuperscript{234} \textit{See Mason, supra} note 4, at 356 (noting that "[a] precise definition of the protected class is crucial").
\item \textsuperscript{235} \textit{See SOLOVAY, supra} note 11, at 114 (explaining that there are no uniform laws regarding weight discrimination).
\item \textsuperscript{236} Fernandez, \textit{supra} note 1.
\end{itemize}
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C. The Mechanics of a National Law Prohibiting Weight Discrimination

A national law prohibiting weight discrimination would necessarily address several issues. First, it would define the protected class. Ideally, it would prohibit discrimination on the basis of simple "weight," thereby including the overweight, obese, and morbidly obese. By protecting people on the basis of weight, the statute would alleviate the problems of applying disability statutes to plaintiffs who are not morbidly obese, but who nonetheless face negative stereotypes. The law would also remedy the problem of perfectly capable employees being forced to prove a disability to establish a discrimination claim.

The prospective law should set forth guidelines identifying the necessary elements of a valid claim. Like Michigan's Elliott-Larsen Act, the new law would allow the plaintiff two options. A plaintiff may present circumstantial evidence of illegal disparate treatment on the basis of weight. Alternatively, a plaintiff may present direct evidence of

237. See Mason, supra note 4, at 356 (noting the importance of defining the parameters of the protected class).

238. See id. (noting that overweight must be defined to encompass anyone "whose weight is excessive enough to affect . . . employment opportunities). Theoretically, this law would also apply to those who may be too thin. HUMAN RIGHTS COMM'N, supra note 10, at 3. Some would advocate any law prohibiting discrimination on the basis of height or weight to be expanded to prohibit any discrimination on the basis of any aspect of appearance. See Elizabeth M. Adamitis, Comment, Appearance Matters: A Proposal To Prohibit Appearance Discrimination in Employment, 75 WASH. L. REV. 195, 220-23 (2000). This Comment does not advocate protection on the basis of personal appearance. A significant issue in prohibiting discrimination on the basis of simple weight is the parameters of the "weight" protected by the statute. The obese and morbidly obese would be protected by the statute. Overweight people who could establish discriminatory animus by the employer would be protected, regardless of actual weight. See Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 593-94 (Mich. Ct. App. 1998) (per curiam). What if someone who was fifteen pounds overweight wanted to bring a claim? Without proof of discriminatory animus, the plaintiff would have to prove that he was treated differently than a similarly situated employee, or replaced by a thinner person. Hein v. All Am. Plywood Co., 232 F.3d 482, 489 (6th Cir. 2000). Even then, the employer would only have to show a non-discriminatory reason for action, thus shifting the burden of proof back to the plaintiff. Id. If a person is not significantly overweight, it is unlikely he could sustain either of these claims unless the employee has articulated that the employee's weight was the basis of the negative employment action.

239. SOLOVAY, supra note 11, at 145.

240. Id. at 153-54.

241. Lamoria, 584 N.W.2d at 593 (noting that the two approaches are the "prima facie" case and the "mixed motives" case). This seems to be the best approach under weight-based discrimination laws because it allows plaintiffs to tailor the claim to their available evidence.

242. Hein, 232 F.3d at 489; Lamoria, 584 N.W.2d at 593-94; see also supra notes 167, 170-74 and accompanying text (listing the specific requirements for the two frameworks).
discriminatory animus by the employer on the basis of weight. Of course, in both cases the plaintiff must first show qualification for the job. Both types of claims would be evaluated on a preponderance of the evidence standard.

Naturally, the law must also provide for employers' interests. Employers would receive an exception for a "bona fide occupational qualification." This aspect of the law would adequately address assumptions made by employers about weight, such as the situation in Texas Bus Lines, where the employer acted on the examining doctor's assumption that the plaintiff's weight would affect her job performance. Also, the employer could rebut any evidence of discrimination or animosity toward weight with proof of a non-discriminatory motive.

Like the Michigan and San Francisco statutes in particular, a federal law would encourage mediation and settlements between employees and employers to prevent the burden of litigation. The federal law would

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243. Lamoria, 584 N.W.2d at 593 (referring to these direct evidence cases as "mixed motives" cases).
244. Hein, 232 F.3d at 489; Lamoria, 584 N.W.2d at 592, 594.
245. Hein, 232 F.3d at 489 (noting the burden for "prima facie" cases); Lamoria, 584 N.W.2d at 592, 594 (noting the burden for both types of cases—"prima facie" and "mixed motives").
246. HUMAN RIGHTS COMM’N, supra note 10, at 5-6; Mason, supra note 4, at 360. If correlating to a fitness requirement, weight may be considered a bona fide occupational qualification in certain circumstances, such as police work or firefighting. See Dawn V. Martin, 911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 37, 39-44, 140-41 (1999).
247. EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 967-68 (S.D. Tex. 1996). If Ms. Manuel had been unable to establish that she was qualified for the job, she would have failed under either type of claim possible under a law protecting weight as a class. See Hein, 232 F.3d at 489; Lamoria, 584 N.W.2d at 592-94.
248. If a plaintiff were attempting to prove illegal disparate treatment on the basis of weight, an employer would be able to shift the burden back to the employee by providing a non-discriminatory reason for the employment action. Hein, 232 F.3d at 489. If a plaintiff presents direct discriminatory evidence and the employer shows a non-discriminatory action, the case would go to the fact-finder. Lamoria, 584 N.W.2d at 593. Naturally, employers may have other concerns than the procedural requirements of the law. For example, Jennifer Portnick, by becoming a Jazzercise instructor, would have also acquired the right to market classes under the Jazzercise name. Dan Ackman, The Case of the Fat Aerobics Instructor, FORBES.COM, May 9, 2002 at http://forbes.com/2002/05/09/0509portnick.html. Certain employers and businesses may argue that selling a product requires interaction with the public, an interaction that is affected by the public's perception of their representative's image. See id. While a franchiser may want to control this representation in the public, such behavior may be seen as an "extreme form of discrimination." Id.
249. HUMAN RIGHTS COMM’N, supra note 125. Cases brought under the Michigan law have also been heavily arbitrated. Kristen, supra note 7, at 101-02.
also provide guidance for employers to revise policies that discriminate against overweight workers and provide incentives for equal treatment.\(^{250}\) The law may even persuade employers to educate employees about weight discrimination issues.\(^{251}\) By creating equal opportunities and a welcoming workplace, employers will have a more diverse range of well-qualified employees.\(^{252}\)

V. CONCLUSION

Overweight people have sparse legal protection from weight-based employment discrimination. A federal law explicitly prohibiting weight discrimination would provide effective and uniform legal protection to overweight people facing employment discrimination. This law would protect all overweight people, not just those who are morbidly obese. In addition, it would provide a uniform scheme of prosecution, while at the same time encouraging settlement, cooperation, and understanding between employers and employees.

As medical information shows, obesity and overweight conditions may not be as unhealthy as negative stereotypes assert. These negative stereotypes affect increasing numbers in the American workforce. By protecting these workers from weight discrimination, they will be encouraged to "invest[] in their own human capital" and contribute to the economy.\(^{253}\)

\(^{250}\) HUMAN RIGHTS COMM’N, supra note 10, at 5-6. Although evaluating treatment of obese employees under the ADA, some of the practical tips from the Employer’s Guide to the Americans with Disabilities Act provide valuable guidance for an employer in interacting with overweight workers. JAMES G. FRIERSON, EMPLOYER’S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 244 (2d ed. 1995). For example, employment decisions should be based on ability instead of size or appearance. Id. Also, overweight workers should be employed if they are qualified. Id. In addition, employment should not be denied “because of a risk of increased health claims.” Id.

\(^{251}\) See HUMAN RIGHTS COMM’N, supra note 10, at 5-6. By alleviating employment discrimination against the overweight, education of the general public will also be achieved. For example, an overweight special education teacher is able to remove the negative stereotype of the word “fat” for her students. Minority Report, supra note 191.

\(^{252}\) SOLOVAY, supra note 11, at 118; see supra Parts I.A-B (describing the pervasiveness of weight discrimination that causes qualified workers difficulty finding suitable jobs or alternatively causes qualified overweight workers to remove themselves from the job market).

\(^{253}\) Kristen, supra note 7, at 71.